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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 642

ELEANORE M. LOEB, *Petitioner*

v.

WILLIAM LOEB, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK JOINTLY WITH OR IN THE ALTERNATIVE TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

BENJAMIN H. SULLIVAN,
Union Trust Building,
Washington 5, D. C.
Attorney for
Eleanore M. Loeb,
Petitioner

CLARENCE COIT MELENEY,
ALEXANDER C. DICK,
ROBERT E. ENGEL
All of: 420 Lexington Ave.,
New York 17, N. Y.
Of Counsel.

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions for Review	2
Constitutional and Statutory Provisions Involved	5
Statement	5
Argument	9
Conclusion	18

Appendix:

Opinion of the Court of Appeals	A-1
Dissenting Opinion	A-6
Order of the Appellate Division (granting leave to appeal) No Opinion	A-11
Opinion of the Supreme Court, New York County (dismissing complaint)	A-12
Final Order and Judgment of the Court of Appeals entered October 16, 1958—(denying motion for reconsideration)	A-16
New York Court of Appeals Judgment entered June 25, 1958 (Remittitur)	A-17
Judgment of Supreme Court, New York County, entered July 29, 1958 on Judgment of the Court of Appeals	A-19
Judgment of Supreme Court, New York County, entered after trial on August 27, 1956	A-20
Civil Practice Act, Sec. 1170-b	A-22
Civil Practice Act, Sec. 1165-a (1, 3)	A-22
Civil Practice Act, Sec. 1166	A-23

TABLE OF CASES

Page

Estin v. Estin, 334 U.S. 541 11
Vanderbilt v. Vanderbilt, 1 A.D. 2nd, 3, 11 12
Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) 14
Vanderbilt v. Vanderbilt, 1 N.Y. 2nd, 342 15

CONSTITUTION

Art. IV, Sec. 2 ..... 2, 3, 5, 10
Amend. XIV, Sec. 1 ..... 2, 3, 4, 5, 9, 10, 13

STATUTES

28 U. S. C., Sec. 1257 (3) 2
N. Y. V. P. A., Sec. 1165-a(1-3) 5
N. Y. C. P. A., Sec. 1166 5
N. Y. C. P. A., Sec. 1170-b, ... 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 17
Vermont Statute—47-3253 7

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of the State of New York, the highest court of that State, entered October 16, 1958, denying motion for reargument and reconsideration of its decision rendered on June 25, 1958 affirming the judgment of the Supreme Court of the State of New York, County of New York dismissing the Complaint; on

which decision remittitur was filed in the Supreme Court in the County of New York on July 29, 1958 and judgment entered thereon.

OPINIONS BELOW

Court of Appeals of the State of New York, 4 N.Y. 2d, 542 (Appendix A-1-11).

Appellate Division of the Supreme Court of the State of New York, First Judicial Department in the County of New York. No Opinion. Order certifying that a question of law is involved which ought to be reviewed by the Court of Appeals. Record on Appeal pp. 98-99; Appendix A-11—A-12).

Supreme Court of the State of New York, County of New York, 3 Misc. 2d, 622 (Record on Appeal, pp. 87-90; Appendix A-12—A-16).

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS FOR REVIEW

Whether the Court of Appeals of the State of New York deprived petitioner of her rights under:

Section 2 of Article IV of the Constitution of the United States—and

Section 1 of Amendment XIV to the Constitution of the United States,

in determining and deciding that the provisions of Section 1170-b of the New York Civil Practice Act were intended to afford relief and apply only to a

limited group or class of persons, whose requirements of status the Court describes and which group it designates as "New York wives" though no such classification or designation is in the statute;

And not to a spouse who was at no time during the course of her marriage a "New York wife";

And in further deciding petitioner "may in no sense be regarded as a "New York wife", thereby depriving petitioner of relief under Section 1170-b of the New York Civil Practice Act in this erroneous construction of said Section; and in disregarding evidence that New York had sufficient "contacts" with this marriage to permit jurisdiction of the suit—in that petitioner moved to New York by agreement with her husband and at his request.

Section 2 of Article IV of the Constitution of the United States—reads in part as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Section 1 of the Amendment XIV to the Constitution of the United States—reading in part as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside"—

and the further provision that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws."

2. Was the interpretation of the Civil Practice Act, Sec. 1170-b, by the Courts below, discriminatory, and as applied below, has petitioner been denied equal protection of the laws by the fact that this interpretation limited relief under Section 1170-b to a class of persons designated by the Court, but not the Statute, as "New York wives"; thereby excluding petitioner from the class or group arbitrarily created by the Court for protection under Section 1170-b and setting up unequal and discriminating administration of a statute unambiguous, fair and legal on its face, in violation of the provisions of Section 1 of Amendment XIV to the Constitution of the United States providing that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside," and the further provisions that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * or deny to any person within its jurisdiction the equal protection of the laws."

3. Whether the New York Court of Appeals in deciding that petitioner was not entitled to relief under Section 1170-b of the Civil Practice Act of New York, thereby denying her rights guaranteed under the Constitution of the United States, has decided a federal question of substantial importance and probably not in accord with applicable decisions of this Court and especially the decision in the *Vanderbilt* case (354 U.S. 416, 1957.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2 of the Constitution of the United States which reads in part:

> "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1, which reads in part:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside",

and the further provisions that:

> "No State shall make or enforce any law which shall abridge the Privileges or Immunities of Citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act, Sections 1170-b, 1165-a (1-3) and 1166 (Appendix A-22—A-23).

STATEMENT

This action for separation or divorce and for relief under Section 1170-b of the Civil Practice Act of New York was commenced by the respondent's wife by sequestration of the property of the defendant in New York. Thereafter, defendant appeared generally and answered the complaint and set up as a bar to the action his jurisdictional objections on certain proceedings between the parties in the State of Vermont.

The parties were married in Connecticut in September 1942. Both, at the time, were residents of New York, and had been since birth. Plaintiff was twenty-four years of age, defendant thirty-four. This was plaintiff's first marriage; defendant's second.

About the time of the marriage, defendant moved to Vermont and established himself in the newspaper business; plaintiff continued to reside in New York until 1944 when she gave up work which she was doing and joined her husband in Vermont, which State continued to be their matrimonial domicile until the defendant deserted and abandoned his wife and home in 1951. He went to live in New Hampshire for a period of months, then secretly went to Nevada in April 1952; obtained an exparte divorce in that State on July 11, 1952 and four days later remarried there.

The issue of the marriage was one daughter, Penelope, born in October 1948.

During the period when the marriage appeared doomed, defendant requested his wife, the plaintiff, to go to live near his mother so that she could see Penelope frequently. The mother lived in Oyster Bay, Long Island. Said request by the defendant is evidenced in his own writing in his letter of April 6, 1951 to his mother as follows:

> "So Eleanore and I have talked things over and she has agreed at all times to live within 30 miles of you so you can readily see Penny at any time you feel like it. As a matter of fact I think she would be perfectly willing to live with you at Oyster Bay if you wanted her" [Record on Appeal, p. 81]

In accordance with her husband's request, as soon as possible after she had been deserted, plaintiff moved

to Oyster Bay, Long Island, and maintained residence for about two years with defendant's mother. Plaintiff then moved to Amenia, New York. At the time this action was instituted, plaintiff lived in Oyster Bay. When the action was tried, plaintiff lived in Amenia, New York. From the time the plaintiff, at defendant's request, moved into the home of defendant's mother, plaintiff has lived continuously in the State of New York.

Since January 1952 defendant has contributed not one cent to the support of the plaintiff. Defendant is a man of wealth and commands a high income, his last reported salary being $50,000.00 a year. He is sole owner of several corporations, the net income of one having exceeded an average of $50,000.00 for five years or more.

In November 1952, some four months after defendant's divorce and remarriage in Nevada, plaintiff, unable to get personal jurisdiction of the defendant who then lived in Nevada, commenced an action in Vermont for the custody of Penelope, under a Vermont statute which read:

> "When parents of minor children are living separately, on petition of either parent, the county court may make such decree concerning the care, custody and maintenance and education of the children, as in cases where the court grants a divorce. Thereafter, on the petition of either of the parents, such court may annul, vary or modify such decrees."—V.S. 47 3253.

Defendant filed a Special Appearance and then waived the same, filing an answer setting up his Reno divorce and his residence in Nevada.

Plaintiff filed a replication denying the validity of the Nevada divorce and requesting alimony for herself and support for Penelope. This action was tried in April 1953 before the Windham County Court in Vermont. A decision was not handed down until the following year and, pending decision, plaintiff sold her house in Vermont and moved to New York, as aforesaid, in August 1953. She more than completed the required one year period of residence before commencing this action in November 1954.

The Vermont trial Court granted to plaintiff support for Penelope and alimony for plaintiff. The trial court sustained defendant's contention as to the validity of his Nevada divorce and his subsequent remarriage. Custody of Penelope was granted to plaintiff.

On appeal, the Vermont Supreme Court sustained the award for support for Penelope, but held it had no jurisdiction to grant alimony to plaintiff because she was divorced at the time she brought the action. The Supreme Court's judgment was handed down some months after plaintiff had commenced action in New York.

The plaintiff's case in New York was tried before Special Term in April 1956 and a few weeks later the trial court dismissed the plaintiff's action on the ground that plaintiff "was advised through her Vermont suit" that relief of alimony was not open to her and that justice did not require that support be awarded in a New York action "in which plaintiff starts with the knowledge that she cannot prevail."

The Appellate Division, First Department, affirmed unanimously, without opinion, but granted leave to

appeal to the Court of Appeals on the grounds that questions were open which that Court should decide.

The Court of Appeals affirmed the trial court's decision on June 25, 1958, two Justices dissenting and on October 16, 1958 denied a Motion for Reargument.

Plaintiff's claim that an adverse decision would violate her Constitutional rights was raised in her amended complaint in the following allegations:—

> "A-1 Plaintiff brings her action for relief, as hereinafter alleged, by virtue of the provisions of the laws of the State of New York, among which are those of Section 1170-b of the Civil Practice Act, and further alleges that she is entitled to such relief as a person to whom is guaranteed equal protection of the laws of said State by the Fourteenth Amendment of the Constitution of the United States, and Article 1, Section 11, of the Constitution of the State of New York." [Record on Appeal, p. 24]

This issue was not specifically discussed by the trial court or the Court of Appeals in their original opinions, but the issue was before the courts, and was developed at length in the motion for reargument and supporting affidavits before the Court of Appeals which are a part of the record in this case and to which attention is specifically requested.

ARGUMENT

The decision of the Court of Appeals of the State of New York apparently overlooked, but in any event disregarded the fact that plaintiff-appellant there—petitioner here—in an amendment to her complaint, asserted that she was entitled to relief under Section 1170-b as a person to whom is guaranteed the equal

protection of the laws of the State of New York by the Fourteenth Amendment of the Constitution of the United States. (Record on Appeal, page 24).

Deprivation of petitioner's constitutional rights is the basis on which the granting of this petition is urged. Such rights are guaranteed by the Fourteenth Amendment to the Constitution of the United States and also by Section 2 of Article IV of the Constitution of the United States itself, the pertinent portions of which are set forth under Questions for Review herein.

This denial of fundamental constitutional rights was effected by the Court of Appeals of the State of New York through holding that only a certain class of persons designated "New York wives" is entitled to relief under Section 1170-b of the Civil Practice Act and not to a spouse who was at no time during the course of her marriage a "New York wife". And in further holding that "The purpose of section 1170-b was a protective one; it sought to afford a remedy to *wives here* whose property rights might be jeopardized by an ex parte divorce by their spouses. It was not intended as a substantive grant of a forum to all wives, wherever located, whose husbands had obtained ex parte divorces not including support provisions for them."

Petitioner, at the time she commenced this action, was a citizen of the United States and a citizen of the State of New York and entitled to full protection of the laws of the State of New York. Having resided in New York State more than twelve months prior to commencement of her action, had standing to bring such a suit and jurisdiction was effected by the sequestration of defendant's New York assets.

The term "New York wife", so far as Counsel for petitioner has discovered, was never used in legal or other serious writing prior to the recommendation by the Law Revision Commission to the Legislature that resulted in the enactment of Section 1170-b. (1953 Report of New York Law Revision Commission, pp. 463-480). The term appeared twice in the informal portion of the Commission's recommendation to the Legislature, and in both places the use was casual and informal and referred to the then recently decided *Estin* case:

> "The *Estin* case called attention to the injustice to a New York wife whose husband had obtained a divorce in another state in an *ex parte* proceeding. * * * (p. 467)
>
> "The Commission believes that legislation is necessary to protect a New York wife whose right to support from her husband may now be completely cut off by an ex parte foreign divorce decree in the absence of a previous New York separation decree with provision for maintenance. * * * (p. 468)"

This two-page recommendation constituted the first part of the Commission's report. The second part of the report was a study made at the direction of the Commission by Professor William Tucker, Dean of the New York University School of Law, Research Consultant. In the ten pages of scholarly discussion on the subject, which covered the law not only of New York but of various other states, not once is a wife referred to by any such designation as a "New York wife" or "Ohio wife" or "Nevada wife". She is referred to as a wife, residing in this or that place, and suing in this or that court.

The recommendation of the Commission to the Legislature was for the amendment of the Civil Practice Act by inserting a New Section to be numbered 1170-b. The text of the Section as proposed by the Commission was enacted almost word for word by the Legislature into the Statute now under discussion. The Commission did not carry the phrase "New York wife" into the title or the text of the statute it recommended, and the phrase would have died of insignificance had it not been raised in the Vanderbilt litigation. However, the failure of the Legislature to include the phrase or its expanded equivalent in the Statute is the most eloquent testimony to the fact that the Legislature did not want such a provision in the Statute, nor can it be contended that this was an oversight by the Legislature, for there had been proposed legislation which included it, which was rejected. This was pointed out by the Appellate Division, in the *Vanderbilt* case (1 A.D. 2nd 3, 11) with the following significant remarks:

> "The husband contends that the statute, apart from legislative power, and as a matter of interpretation, necessarily implies that there must have been a matrimonial domicile in New York before relief may be obtained under it. There is nothing in the language of the statute to require it. Moreover there had been proposed legislation which would have made such a requirement, but it was never adopted (Senate Introductory No. 2366, Senate Print No. 2611 (1948). There are many good reasons which may be suggested for omitting such a requirement. But that policy question is for the Legislature and not the courts to decide . . . ."

In the face of the foregoing how can any married woman be dubbed a "New York wife" for the purpose

of denying, or for that matter granting her relief provided under the clear and unambiguous Section 1170-b. She is neither a New York wife nor a Vermont wife. She is *a wife* and, more important from a constitutional standpoint, she is a citizen of the State of New York, having fulfilled the residence requirements when she brought this action.

Clearly the Court of Appeals of the State of New York by its interpretation of Section 1170-b, discriminated against petitioner and deprived her of fundamental rights guaranteed to her by the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

Apart from the foregoing violations of petitioner's constitutional rights, there is another compelling reason for review by this Court of the decision of the New York highest Court, namely this: the New York court interpreted Section 1170-b unwarrantably in a manner which defeats the purpose this Court had in view in its creation of the divisible divorce doctrine.

The purpose of that doctrine, the ends it was desired to effect, may be simply stated in their positive and negative aspects. A husband was enabled against the wishes of his wife to get a valid divorce by migrating to a foreign state (e.g., Nevada) and there prosecuting an ex parte action. He could then remarry without fear of the charge in any other state of adultery or bigamy.

It was not the purpose of this Court to relieve the migrating husband of his duty to support the wife he had deserted and cast off. On the contrary, this Court was careful to say from the first that the ex parte divorce did not touch, could not adjudicate, any per-

sonal rights between the parties. The most important of such rights to the deserted wife is that of support, concerning which this Court spoke specifically in the recent case of *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957) as follows:

> "The Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada divorce, to the extent it purported to affect the wife's right to support, was void."

After this Court's decision in *Vanderbilt* most certainly, if indeed not before, the New York Court of Appeals had to recognize that the abandoned wife's support right existed after the ex parte divorce untouched and undiminished, as of course did the husband's co-relative obligation to support. It was the plain duty of the New York court to interpret Section 1170-b of the Civil Practice Act to enforce the right of support and make the husband live up to his obligation. In short, it was the duty of the New York courts to carry out and effect the full and complete purpose and plan of the divisible-divorce doctrine, and not just that part of the doctrine which freed a migrating husband from the bonds of matrimony which, for reasons he is not called upon to justify or even to state, had become irksome to him.

Why did the Court of Appeals fail in this respect? It was not on any moral ground, as there was no suggestion in the record that plaintiff had committed any sin or fault, or that she had fallen short in her duties as a wife in any particular whatsoever. It was not

on any ground of public policy as enunciated in decisions of New York courts or in New York statutes, least of all in the statute under consideration, about which the Court of Appeals had just commented at page 349 in its *Vanderbilt* decision (1 N.Y. 2d, 342):

> "There is nothing in the statute's language to suggest that it was intended to apply only to marriages where the parties had lived together in this State as their matrimonial domicile."

What seems to have compelled the Court of Appeals to decide against plaintiff was over-emphasis, or more accurately false emphasis, on the motives that brought her to New York. She is viewed as an "emigrant wife" who journeyed to this State "to avail herself of the remedy afforded by Section 1170-b, or as an "out of state spouse" attracted to New York by the opportunity the statute opened "to take advantage of our courts," and the fear seemed to lurk that she would be one of a great number who would do likewise. Actually the evidence was, as the dissenting opinion (page 553) pointed out, that plaintiff "moved here by agreement with defendant and at his request." But *arguendo* let us assume the contrary. Suppose plaintiff's only reason for coming to New York was to seek the relief unavailable in Vermont offered by Section 1170-b. Is there anything sinister or immoral in such a move, or in such motivation for the move? We submit there is not. People may be influenced to move into different states because of various laws which they consider advantageous. Such a move does not constitute taking advantage of such laws in any improper sense, and certainly is not seeking "to take advantage of the court" whose duty it is to administer or apply such laws in cases coming before them.

In short, plaintiff's intent and motives in coming to New York are irrelevant, and inquiry into them and speculation about them is improper, fruitless and confusing. Plaintiff had the right of support from the husband who had abandoned her,—no one questions that. She certainly is not open to criticism for trying to enforce that right by any legal means available to her anywhere.

There is something quite ironic in the New York courts' urge to dub plaintiff an "emigrant wife" and regard her as some kind of menace. She is made to appear a wrong-doer instead of a sufferer from a wrong perpetrated by defendant. No spot light is put on defendant, who was the first to become itenerant or an emigrant from the established marital home in Vermont. No comment is made on his motive in going to Nevada, though it was obviously and admittedly for the something-less-than-noble purpose of getting a divorce in order to marry another woman. His motive in this migration to Nevada is, under the divisible divorce doctrine, irrelevant and of no significance whatsoever. The same should be true of all plaintiff's moves subsequent to her abandonment, and such it is submitted should be the pronouncement of this Court. Clarification of the doctrine of divisible divorce requires it.

The Court of Appeals also goes far afield, we believe, in gratuitously defining "the interest of the State" (page 548) and interpreting Section 1170-b to protect and further this assumed "interest" and to avoid a social condition considered by the court to be undesirable. In this wrongful shift of judicial concern, it is worthy of note that the Court of Appeals created a worse sociological condition than the fancied

me it was seeking to avoid. The court was concerned that New York should not become a haven for "emigrant wives" journeying to the state to avail themselves of the remedy afforded by Section 1170-b. But by its decision in this case the court has made New York a haven for emigrant husbands who seek to avoid the obligation contemplated by the divisible-divorce doctrine. If this decision stands, husbands from every other state in the union who have deserted their wives and procured easy ex parte divorces, can "journey to New York" with all their property and be forever secure against any attempt to force them to pay alimony, —forever free from any obligation to support the women they had sworn to cherish.

This is a mockery of justice. It is a distortion of this Court's concept of the doctrine of divisible divorce. It is a complete negation and defeat of the sacred support right of innocent and virtuous wives which this Court sought to make secure.

Common sense and elemental justice require that this Court review and reverse the decision of the New York Court of Appeals, and interpret Section 1170-b to buttress and effect the purposes of the divisible-divorce doctrine, not to defeat them.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue as above requested.

Respectfully submitted,

Dated: January 13, 1959

BENJAMIN H. SULLIVAN,
Union Trust Building,
Washington 5, D. C.
Attorney for
Eleanore M. Loeb,
Petitioner

CLARENCE COIT MELENEY,
ALEXANDER C. DICK,
ROBERT E. ENGEL
All of: 420 Lexington Ave.,
New York 17, N. Y.
Of Counsel.

APPENDIX

Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 483

ELEANORE M. LOEB, *Appellant*,

v.

WILLIAM LOEB, *Respondent*.

Decided June 25, 1958

Froessel, J.

Plaintiff and defendant were married in Connecticut on September 26, 1942. Defendant was then a resident of Vermont and plaintiff a resident of New York, though employed as an instructor in equitation and living at a school in Virginia. In 1944 the parties established their matrimonial domicile in the State of Vermont. There they spent all of their married life together, except that in June, 1951 defendant left plaintiff and took up residence in New Hampshire, where he remained until April, 1952. He then moved to Nevada, where he subsequently obtained an *ex parte* divorce in July, 1952. This decree of divorce made no provision for the support of plaintiff nor for the custody and support of their child.

Meanwhile, however, while defendant was paying plaintiff $700 per month, the parties were negotiating with respect to property rights, permanent support, maintenance, custody and other matters. According to plaintiff, these negotiations were terminated because she refused to execute a release to the woman whom defendant subsequently married, whereupon he paid $300 for the support of the child only.

On November 15, 1952 plaintiff petitioned the Windham County Court in Vermont seeking custody of the daughter

of the marriage. Defendant, after first filing a special appearance, later appeared generally, pleaded the Nevada divorce as a bar to the action, and asked for custody of the child during the school year. Plaintiff in a reply challenged the validity of defendant's Nevada divorce and requested that the court make an order (1) for the support of the child, (2) for the support of plaintiff, and (3) for an award of counsel fees (*Loeb* v. *Loeb*, 118 Vt. 472, 476). A trial was had in June, 1953 in the County Court.

In August, 1953, while the action was still pending in said court, plaintiff sold their home for $21,800. She thereupon moved to the home of defendant's mother in Oyster Bay, New York, apparently staying there from October, 1953 through July, 1955, when she purchased a home in Amenia, Dutchess County, New York, for $35,000, a $20,000 mortgage on which was given by defendant's mother. Plaintiff testified that in October, 1953 she formed the intention to become a resident of the State of New York. As late as August, 1953 she filed her notice of retaining residence in Vermont with the town clerk of Windham. This was more than a year after defendant had secured his divorce.

The Vermont County Court, on March 20, 1954, (1) awarded plaintiff custody of the couple's daughter, granting defendant visitation rights, (2) ordered defendant to pay $450 a month for the support of the child, (3) directed defendant to pay $350 a month for plaintiff's support, and (4) ordered defendant to pay $6,289.39 for attorneys' fees and disbursements. That court also ruled that defendant's Nevada divorce decree was entitled to full faith and credit.

An appeal was taken to the Vermont Supreme Court in April, 1954 and, in a decision of May 3, 1955, that court affirmed so much of the County Court order as related to custody and support of the infant as well as the provision for attorneys' fees and disbursements, agreed that the Ne-

vada divorce was valid, but reversed so much of the lower court determination as related to plaintiff's support. The Vermont Supreme Court took the view that neither under the applicable Vermont statute nor under common law did the County Court have power to entertain a petition for support by a person who had been validly divorced in another jurisdiction (118 Vt., *supra*, pp. 483-486). The Vermont court distinguished the situation before it from cases in which the wife had judgment in her favor awarding support or alimony in separation or limited divorce proceedings *before* the award of the foreign divorce (p. 481, citing *Estin* v. *Estin*, 334 U.S. 541, and *Morris* v. *Morris*, 118 Vt. 270).

Thus the Vermont Supreme Court ruled that, in the absence of statute, plaintiff might not have an award of support in her favor because the Vermont County Court was not vested with jurisdiction—i.e., was not *competent* —to make such an award. It may be noted that a situation parallel to that in New York was a reason for recommendation of the enactment of section 1170-b of the Civil Practice Act (1953 Report of N. Y. Law Rev. Comm., p. 475).

Prior to the decision of the Vermont Supreme Court, plaintiff instituted an action in our courts seeking (1) alternatively an absolute divorce or separation from defendant; (2) provision for her support and maintenance; (3) custody of the infant issue of the marriage and provision for said infant's support, and (4) such other relief as she might be entitled to under sections 1170-a and 1170-b of the Civil Practice Act. On November 23, 1954 she procured a sequestration order against defendant. In November, 1955, after defendant had appeared generally in the action, a supplemental complaint was filed by plaintiff setting forth the decision of the Vermont Supreme Court, and on April 25, 1956 plaintiff amended her complaint to allege her residence in the State for more than

one year so as to comply with section 1170-b of the Civil Practice Act.

The trial court dismissed her complaint in all respects (3 Misc. 2d 622). It correctly held that the issues relating to the validity of the Nevada divorce decree had been resolved against her in the plenary Vermont proceeding which she instituted. The remaining questions on this appeal relate to the application of section 1170-b of the Civil Practice Act to the facts of this case. Plaintiff argues that the section is applicable, and that it was error for the lower courts to have failed to accord her the requested relief under it. Defendant contends that the statute is inapplicable, and that it may not constitutionally afford plaintiff the relief she seeks.

We are thus faced in this case with the question left open by us in *Vanderbilt* v. *Vanderbilt* (1 N. Y. 2d 342, affd. 354 U. S. 416). There we held that where a wife, after separation but *prior* to the grant of an *ex parte* Nevada divorce, established her domicile in New York, she could avail herself of the provisions of section 1170-b and secure an order of support from the New York courts after the Nevada divorce. We stated (p. 351) that we need not decide there "whether she should have the same right to come into New York, even after a foreign-State divorce, to take advantage of section 1170-b".

Section 1170-b of the Civil Practice Act was recommended by the Law Revision Commission in 1952, with the statement that: "The Commission believes that legislation is necessary to protect a New York wife whose right to support from her husband may now be completely cut off by an *ex parte* foreign divorce decree, in the absence of a previous New York separation decree with provision for maintenance." (1953 Report of N. Y. Law Rev. Comm., p. 468.)

The Legislature, in enacting section 1170-b in 1953 with the recommendations of the Law Revision Commission be-

fore them, intended that section to apply only to "New York wives" and not to a spouse who was at no time during the course of her marriage a "New York wife". The purpose of section 1170-b was a protective one; it sought to afford a remedy to wives here whose property rights might be jeopardized by an *ex parte* divorce by their spouses. It was not intended as a substantive grant of a forum to all wives, wherever located, whose husbands had obtained *ex parte* divorces not including support provisions for them.

Recognizing the social problems created by the frequent inequality of mobility and financial means as between husband and wife, the Legislature aimed to aid those wives who were unable to pursue their itinerant spouses and obtain support rights in foreign jurisdictions. However, such a policy is not furthered by allowing emigrant wives to journey to this State to avail themselves of this remedy. The interest of this State is the protection of the families located here, not the attraction of out-of-State spouses who seek to take advantage of our courts. This construction of the statute is supported by the opinions of those courts which have commented upon it (*Vanderbilt* v. *Vanderbilt*, 1 A. D. 2d 3, 11, affd. 1 N. Y. 2d 342, affd. 354 U. S. 416, *supra*; see, also, 43 Corn. L. Q. 265, 270, 274), and avoids the constitutional questions raised by Justices HARLAN and FRANKFURTER in their dissenting opinions in the *Vanderbilt* case (354 U. S. 425, 433-434).

While we are not unmindful of the fact that, so far as this record shows, defendant's conduct toward his wife left much to be desired, the wife has not placed herself in a situation helpful to her in the State of New York. While this State was her domicile before marriage, Vermont was definitely her domicile since 1944. Her husband is said to have abandoned her in June, 1951. He secured his Nevada divorce in July, 1952. In August, 1953 she filed notice of retaining residence in Vermont with the town clerk of Windham, and not until October, 1953, 1¼

years after she had been divorced, did she first declare her intention to become a resident of New York State. She then lived with her mother-in-law some 20 months—not pursuant to any agreement with her husband, for the negotiations had been terminated, but because the husband's mother was exceedingly kind to her and paid all her expenses. In the meantime, she was pursuing her martial rights in the courts of her domicile, the State of Vermont. Under the circumstances presented by this record, it seems abundantly clear that plaintiff has had no contact with New York at any time during the period of their marriage, may in no sense be regarded as a New York wife, and accordingly is not entitled to relief under section 1170-b of the Civil Practice Act.

Under our construction of section 1170-b of the Civil Practice Act, the further issues posed by plaintiff in her brief are of little consequence. While it may be true, as her counsel alleges, that the trial court made certain factual errors, nevertheless the Appellate Division affirmed its exercise of discretion with the facts accurately set forth before them. The contention that section 1170-b mandates a court to grant support in every case is in any event irrelevant here since plaintiff does not come within the ambit of said statute.

The judgment appealed from should be affirmed, without costs.

Dissenting Opinion

DESMOND, J. (dissenting):

The question is whether, because plaintiff moved into this State after defendant divorced her in Nevada, the New York courts are without power under section 1170-b of the Civil Practice Act to direct defendant to make payments to her for her support.

Section 1170-b (*supra*) contains this: "In an action for divorce, separation or annulment * * * where the court refuses to grant such relief by reason of a finding by the court that a divorce * * * declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction of the person was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife." As we shall show, justice surely requires that this defendant support this plaintiff. The question is whether there is authority in section 1170-b for the provision of such justice by the New York courts. The courts below have held that because of the earlier Nevada divorce the Full Faith and Credit Clause (art. IV, § 1) of the Federal Constitution forbids the application here of section 1170-b.

This chronology will furnish a factual background:

1942—plaintiff, a resident, and defendant, a former resident of New York State, were married in Connecticut.

1944—the parties took up marital residence in Vermont.

1948—a child was born to the parties.

1951—defendant left the family home after announcing his intention to get a divorce and marry another woman and after an agreement between the parties that defendant would continue to pay plaintiff $700 a month for herself and the child and that she and the child would move to the vicinity of Oyster Bay, N. Y., to be near defendant's mother.

1952—defendant refused any longer to pay plaintiff for her own support (he has never since supported her) but continued to support the child. In June, 1952 he went to Nevada where he obtained a divorce in a proceeding in which plaintiff was not personally served and did not appear. The Nevada decree dissolved the marriage but made no provision whatever for support or custody. In November,

1952 plaintiff sued defendant in Vermont for support and custody and for a declaration of invalidity of the Nevada judgment.

1953—in August plaintiff moved to defendant's mother's home in New York State, remaining there until July, 1955 when she bought a residence in New York State in which she has since lived.

1954—in March the Vermont County Court held the Nevada divorce legal and awarded to plaintiff custody of the child and support for her and the child. Later in 1954 plaintiff, obtaining jurisdiction by sequestering defendant's property here, brought in a New York court the present action for a divorce or separation and for support and custody.

1955—the Vermont Supreme Court affirmed the County Court as to the validity of the Nevada judgment and as to custody and support of the child but held that under Vermont law there was no power in the courts to grant support to a woman already validly divorced from her husband. In other words, the Vermont appellate court held itself powerless to pass on plaintiff's prayer for alimony.

1957—after a trial the New York Supreme Court and the Appellate Division dismissed plaintiff's complaint in this suit.

I agree with so much of the decision below in this case as holds that the Nevada divorce is binding. I can see no reason, however, why defendant cannot under section 1170-b (*supra*) be compelled to give plaintiff the support to which she has a right and which he has refused her.

The history and purpose of section 1170-b (*supra*) have been thoroughly explored in the 1953 Law Revision Commission Report recommending its enactment and in *Vanderbilt* v. *Vanderbilt* (1 N. Y. 2d 342, aff'd. 354 U. S. 416). The Legislature granted to the New York courts a new

power to award alimony, when and as justice so requires, to a wife against whom a divorce has been granted without jurisdiction of her person having been obtained. Our decision and that of the United States Supreme Court in the *Vanderbilt* case made it settled law that the statute is generally constitutional even when the wife has not gotten a judgment or agreement for her support before the dissolution of her marriage. Specifically, *Vanderbilt* held that the "Full Faith and Credit" due to the Nevada judgment as a dissolution of the marital status was no bar to later section 1170-b relief. In *Vanderbilt* we left open (because it was not presented by the facts) the question of whether section 1170-b was available to a woman who came to live in New York State after a foreign divorce. And we do not now have to decide whether under any and every possible circumstances the remedy can be demanded by a divorced wife who for her own reasons selects New York as a forum. On the particular facts of this case we must answer these questions: first, is it unconstitutional to apply section 1170-b to one who like this plaintiff became domiciled in New York after divorce, and, second, if it be not unconstitutional so to do, is it contrary to our public policy and the meaning and purpose of section 1170-b?

Vanderbilt v. *Vanderbilt* (354 U. S. 416, 419, *supra*) held flatly that a Nevada decree just like the one here under consideration could not cut off the wife's support right and that "the Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition". The right, therefore, remained. May New York enforce it under the circumstances of this case?

The Supreme Court's majority opinion in *Vanderbilt* v. *Vanderbilt* (*supra*) assumed without discussion that Mrs. Vanderbilt was sufficiently a domiciliary of New York State so that New York could constitutionally enforce

her right to support. One of the dissenting Justices in the United States Supreme Court complained (354 U. S. 425) that the *Vanderbilt* decision would mean that a divorced wife "may sue wherever she can serve the other spouse or attach his property", but he conceded (p. 426) that "New York has substantial connection with a domiciliary who has been divorced *ex parte* in Nevada". The other dissenting Supreme Court Justice in the *Vanderbilt* case thought (p. 435) that the *Vanderbilt* case should have been remanded to the New York courts for a determination (which our courts had in fact already made) as to whether Mrs. Vanderbilt was a New York domiciliary from the time she entered the State.

From all of the above it follows that the only real problem here is whether on the facts of the present case New York had sufficient "contacts" with this marriage so as to permit jurisdiction of this suit. That question is not to be answered "no" just because these two people never lived together in this State since that was the fact as to the Vanderbilts, also. The only reason for a negative answer would be that this plaintiff moved to New York after her husband's divorce. The sound and compelling reason for an affirmative answer is that she moved here by agreement with defendant and at his request. She did not shop around and pick the State most advantageous to her and most inconvenient and expensive for her former husband. Perhaps since her husband had abandoned her she could legally have done just that. But on the facts as they are, justice and public policy forbid defendant from now questioning the validity or effect of the change of domicile he himself urged on his wife.

Some point is made that because of the use in section 1170-b (*supra*) of the word "may" the granting or refusal of relief is discretionary. Possibly that is so, at least as to the amount of support money, but the Appellate Division apparently granted leave to appeal so that we might pass on a question of law and that law question must

be as to whether there is in this case any legal bar to relief. I think there is none.

The judgment should be reversed, with costs, and the case remitted to the Appellate Division to pass on the question of discretion.

Judges Dye, Fuld, Van Voorhis and Burke concur with Judge Froessel; Judge Desmond dissents in an opinion in which Chief Judge Conway concurs.

Judgment affirmed.

Order Granting Leave to Appeal to the Court of Appeals

At a Term of the Appellate Division held in and for the First Judicial Department in the County of New York on the 8th day of October, 1957.

Present:

Hon. Benard Botein,
Presiding Justice,
Benjamin J. Rabin,
Martin M. Frank,
Francis L. Valente,
James B. M. McNally,
Justices.

Eleanore M. Loeb, Plaintiff-Appellant

against

William Loeb, Defendant-Respondent.

The above-named plaintiff-appellant, having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 30th day of April, 1957.

Now, upon reading and filing the notice of motion, with proof of due service thereon, and the affidavit of Alexander

C. Dick in support of said motion, and the affidavit of Alexis C. Coudert in opposition thereto, it is hereby

ORDERED, that the said motion be and the same hereby is granted, and that this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

Enter,

B. B.,
Justice.

Opinion of the Supreme Court, New York County (Dismissing Complaint)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ELEANORE M. LOEB, Plaintiff,

v.

WILLIAM LOEB, Defendant.

Special Term—Part IV

By Mr. Justice Steuer

Decision on June 13, 1956

The above-entitled action having been brought by the plaintiff for a judgment of divorce in favor of the plaintiff and against the defendant upon the ground of the adultery of the defendant at the times and places set forth in the complaint herein or for a judgment of separation upon the ground of the abandonment and non-support of the plaintiff by defendant, and for a judgment for maintenance and an allowance of counsel fees, and the

plaintiff having obtained an order of sequestration of this court entered November 24, 1954, pursuant to which order a levy was made upon property of the defendant situated within the State of New York, and the defendant having been served outside of the State of New York with the summons and verified complaint in this action and having appeared herein by Coudert Brothers, his attorneys, and having answered the complaint herein and the defendant having thereafter served an amended answer and the plaintiff having thereafter served a supplemental complaint, and the plaintiff having moved for an order for temporary alimony and counsel fees and the court having thereafter made its order herein on January 31, 1956 denying plaintiff's motion without prejudice to a renewal thereof at the trial, and the action having regularly come on for trial before Mr. Justice Steuer without a jury at Special Term, Part IV, of this court held on April 26, 1956, at the County Courthouse, City of New York, and the plaintiff having appeared upon the said trial by Meleney, Mitchell & Dick by Alexander C. Dick of counsel, and the defendant having appeared by Coudert Brothers his attorneys by Alexis C. Coudert.

The parties herein were married in 1942. At this time they both were residents of New York though plaintiff wife spent the greater part of her time teaching school in Virginia and defendant husband's newspaper interests kept him mostly in New England. Shortly after their marriage they settled in South Windham, Vermont where they bought a house. There is one child of the marriage.

In 1952 the parties experienced marital difficulties and the defendant left the plaintiff. He went to Nevada and procured a divorce. During the separation extensive negotiations were carried on between the parties as to the support to be provided. One provision of the negotiations is of signicance here. Defendant's mother lived in Oyster Bay, Long Island. All provisions were made contingent upon plaintiff taking the child and residing within twenty

miles of Oyster Bay. This fact was conclusively established. The reason for this was that defendant's mother was very fond of the child and wanted her near her. No provisions resulting from the negotiations were incorporated in the divorce.

In 1953 plaintiff, still residing in Vermont, brought a suit there for support of herself and the child. The court there found the Nevada decree valid, and, while provision for support of the child was made, that part of the decree which provided for the plaintiff was reversed by the Supreme Court upon the ground that the law of Vermont does not sanction support of a former wife.

Plaintiff then moved to this state. She has settled in Amenia. The latter place is not within twenty miles of Oyster Bay, but is sufficiently close to allow frequent visits to and from defendant's mother so that the spirit of the agreement is carried out and lends support to plaintiff's testimony that she resumed her residence in New York in order to comply with the agreement that she made.

This suit is for divorce and separation. It is obvious that the plaintiff cannot prevail. The Nevada decree is an absolute bar to recovery. Questions of the validity of the Nevada decree are no longer open. Litigation of the question in Vermont has settled that the Nevada decree is entitled to full faith and credit, and there is no suggestion of a reason or ground upon which the Vermont judgment can be questioned.

Plaintiff claims, however, that despite this she is entitled to an award of alimony and counsel fee pursuant to C.P.A. 1170-B. The pertinent parts of this section read: "In an action for divorce, separation or annulment, * * * where the court refuses to grant such relief by reason of a finding that a divorce * * * had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife * * *."

The phrase "as justice may require" in the above has received attention in Vanderbilt v. Vanderbilt (147 N. Y. S. 2d, 125). It was there pointed out that the relief provided for in section 1170-B was not limited to wives who had a matrimonial domicile in New York but for those who had not two important questions were to be considered. The first was whether the wife came here prior to the divorce and the second was whether the circumstances of her coming showed that justice entitled her to an award of support. Taking these questions in the reverse order it is clear that a wife who establishes a separate residence in this state, thereby giving her a right to sue, gains nothing from the section unless she establishes something more than convenience and a forum in which she would enjoy greater rights than she would in some other jurisdiction. It may be taken here that her selection of New York as a residence came about as a legitimate selection of a home rather than a forum. This because of the relationship of the child with its grandmother.

On the first question however the findings are not so favorable to the wife. She came here already divorced. She came here from a state which had already decided that one in her status was not entitled to support, and this not in an unrelated action but in her own suit. There could be no clearer instance of a divorced wife who enjoyed no rights in her own domicile seeking to obtain them because now, for other reasons, she had effected a change of residence. The Court of Appeals (Vanderbilt v. Vanderbilt, N. Y.), found it unnecessary in that decision to pass on the question involved.

Lastly it should be pointed out that 1170-B provides no new or separate cause of action. It provides for incidental relief in the actions therein named. This action is only technically for marital relief. Plaintiff was advised through her Vermont suit that no such relief was open to her. It is doubtful whether justice requires that support

can be awarded in an action in which plaintiff starts with the knowledge that she can not prevail.

Judgment for defendant.

NEW YORK COURT OF APPEALS

Order and Final Judgment Entered October 16th 1958

State of New York in Court of Appeals. At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the sixteenth day of October A.D. 1958.

Present, Hon. Albert Conway, Chief Judge, presiding.

Mo. No. 483

ELEANORE M. LOEB, Appellant,

v.

WILLIAM LOEB, Respondent.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

A copy

[SEAL]

/s/ GEARON KIMBALL
Deputy Clerk

New York Court of Appeals

Judgment Entered June 25, 1958

No. 114

COURT OF APPEALS

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of June in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding,
RAYMOND J. CANNON, Clerk,

Remittitur—June 25, 1958

No. 114

ELEANORE M. LOEB, *Appellant*,

v.

WILLIAM LOEB, *Respondent*.

Be it Remembered that on the 29th day of March in the year of our Lord one thousand nine hundred and fifty-eight, Eleanore M. Loeb, the appellant—in this cause, came here unto the Court of Appeals by Meleney, Mitchell & Dick, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And William Loeb, the respondent—in said cause, afterwards appeared in said Court of Appeals by Coudert Brothers, his attorneys.

Which said Notice of Appeal and return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Alexander C. Dick, of counsel for the appellant—, and by Mr. Alexis C. Coudert, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceeding in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, & c.

RAYMOND J. CANNON.
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, June 25, 1958.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

SEAL OF THE COURT OF APPEALS

RAYMOND J. CANNON, *Clerk*

Judgment of Supreme Court, New York County

Entered July 29, 1958 on Judgment of the Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Judgment on Remittitur

ELEANORE M. LOEB, *Plaintiff*,

— against —

WILLIAM LOEB, *Defendant*.

The above-named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Department, in the office of the Clerk of the County of New York on the 4th day of October, 1957, affirming the judgment in favor of the defendant and against the plaintiff heretofore entered herein in the office of the said Clerk on the 27th day of August, 1956, in favor of the defendant and against the plaintiff, and from each and every part of said judgment of affirmance and order of affirmance as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from be affirmed and judgment rendered for the defendant without costs; and having further ordered and adjudged that the proceedings herein be remitted to this Supreme Court there to be proceeded upon according to law; and the remittitur from the said Court of Appeals having been filed herein, and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of COUDERT BROTHERS, attorneys for the defendant herein, it is hereby

ADJUDGED that the said judgment entered herein on October 4th, 1957, be and the same hereby is affirmed.

Judgment signed and entered this 29 day of July, 1958.

JAMES McGUIRRIN, *Clerk*

Judgment of Supreme Court,
New York County,

Entered After Trial on August 27th, 1956

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Special Term, Part IV

Hon. ARON STEUER, Justice.

Judgment

[Same Title]

The above-entitled action having been brought by the plaintiff for a judgment of divorce in favor of the plaintiff and against the defendant upon the ground of the adultery of the defendant at the times and places set forth in the complaint herein or for a judgment of separation upon the ground of the abandonment and non-support of the plaintiff by defendant, and for a judgment for maintenance and an allowance of counsel fees, and the plaintiff having obtained an order of sequestration of this court entered November 24, 1954, pursuant to which order a levy was made upon property of the defendant situated within the State of New York, and the defendant having been served outside of the State of New York with the summons and verified complaint in this action and having appeared herein by Coudert Brothers, his attorneys, and having answered the complaint herein and the defendant

having thereafter served an amended answer and the plaintiff having thereafter served a supplemental complaint, and the plaintiff having moved for an order for temporary alimony and counsel fees and the court having thereafter made its order herein on January 31, 1956 denying plaintiff's motion without prejudice to a renewal thereof at the trial, and the action having regularly come on for trial before Mr. Justice Steuer without a jury, at Special Term, Part IV, of this Court held on April 26, 1956, at the County Courthouse, City of New York, and the plaintiff having appeared upon the said trial by Meleney, Mitchell & Dick by Alexander C. Dick of counsel, and the defendant having appeared by Coudert Brothers his attorneys by Alexis C. Coudert of counsel, and the allegations and proof of the parties having been heard, and due deliberation having been had, and the court having duly made and filed its decision on June 13, 1956, in and by which it refused to grant the relief asked for by the plaintiff herein by reason of its finding that a valid divorce had been duly granted to the defendant herein by decree of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, dated July 11, 1952, in an action brought by the defendant herein in which jurisdiction of the person of the plaintiff herein was not obtained, and the further finding that plaintiff was not entitled to a judgment for maintenance pursuant to Section 1170-b of the Civil Practice Act or to an allowance for counsel fees,

Now, on motion of Coudert Brothers, attorneys for the defendant, it is hereby

ORDERED, ADJUDGED AND DECREED, that the complaint in this action be and the same hereby is dismissed upon the merits.

Enter,

A. S.,
J.S.C.

ARCHIBALD R. WATSON, Clerk.

STATUTORY PROVISIONS INVOLVED

Sec. 1170-b. Maintenance of wife where divorce or annulment previously granted on nonpersonal jurisdiction.

In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this action shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.

Added by L. 1953 ch. 663, effective April 13.

Sec. 1165-a. Conditions attached to maintenance of action for annulment or separation. An action to annul a marriage or for separation may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced.

* * * * *

3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action.

Sec. 1166. Residence of married woman in action for divorce or separation. If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

ILE COPY

Office Supreme Court, U.S.
FILED
JAN 30 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM 1958.

No. 642

ELEANORE M. LOEB,

Petitioner,

against

WILLIAM LOEB,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALEXIS C. COUDERT,
488 Madison Avenue,
New York 22, N. Y.
Attorney for Respondent

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

	PAGE
STATEMENT	1
STATEMENT OF FACTS	2
POINT I—Section 1170-b of the New York Civil Practice Act as interpreted by the Court below does not discriminate unconstitutionally against petitioner	5
POINT II—No decision of this Court supports petitioner's argument that New York is obligated to provide for her	7
CONCLUSION	8

Table of Cases.

	PAGE
Douglas v. *New York, New Haven & Hartford Railroad Company*, 279 U. S. 377, 387 (1929)	6
Hague v. *C. I. O.*, 307 U. S. 496, 511	5
Herndon v. *Georgia*, 295 U. S. 441, 443	5
Loeb v. *Loeb*, 118 Vt. 472	4
New York Rapid Transit Corp. v. *City of New York*, 303 U. S. 573, 578	6, 7
Vanderbilt v. *Vanderbilt*, 354 U. S. 416, 425	4, 7

Statutes.

Civil Practice Act,
- Section 1170-a 1
- Section 1170-b 1, 2, 4, 5, 6, 7, 8

Constitution of the United States,
- Article IV, Section 2 ..... 4, 5
- Fourteenth Amendment, Section 1 ..... 4, 6

Supreme Court of the United States

OCTOBER TERM 1958.

No. 642

ELEANORE M. LOEB,

Petitioner,

against

WILLIAM LOEB,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This brief is submitted in opposition to petitioner's application for a writ of certiorari to the Court of Appeals of the State of New York jointly with or in the alternative to the Supreme Court of the State of New York, County of New York.

This action was commenced in the Supreme Court, New York County, by petitioner Eleanore M. Loeb by levy pursuant to an order of sequestration dated November 23, 1954. The complaint prayed for a decree of separation or divorce and included a demand for alimony and an allowance for the maintenance of the issue of the marriage, together with such other relief as petitioner might be entitled to under Sections 1170-a and 1170-b of the Civil Practice Act (10-66). On the trial petitioner made no attempt to challenge the validity of a decree of divorce

obtained by the respondent in Nevada in 1952 and rested her case wholly upon the Provisions of Section 1170-b of the Civil Practice Act.

The trial court dismissed the complaint on the merits and its judgment was unanimously affirmed without opinion by the Appellate Division. The Court of Appeals affirmed with two judges dissenting. Petitioner's motion for reargument was denied without opinion.

Statement of Facts.

The facts which we regard as material, many of which were stipulated, can be summarized as follows:

The parties to this action were married in Connecticut in 1942 (118) [References are to folios of the Record on Appeal printed for use by the Court below]. At that time petitioner was a riding instructor at a girls' boarding school in Virginia, although she testified that she was living with a Mrs. MacDonald in Jericho, New York (155-156). The petition erroneously states (p. 6) that both parties were residents of New York when they were married. In fact, at that time respondent was a resident of Vermont, and had been since 1941, as established by the stipulation of facts (119). Respondent was then and continues to be a publisher of newspapers in Vermont and New Hampshire.

The parties established their first and only matrimonial residence in 1945 in South Windham, Vermont, where they purchased a house (120). In 1948 the only child of the marriage was born (119). In June 1951 respondent left the house at South Windham, Vermont (120). Since April 24, 1952, he has maintained his only residence and place of abode in the State of Nevada and intends to continue to reside in and make Nevada his home indefinitely (130).

Petitioner sold the house in Vermont and left there in August 1953, going to Oyster Bay, N. Y., to live with respondent's mother (180). Petitioner testified that in the summer of 1953 she intended to make Vermont her permanent residence but that in October 1953 she decided that she was going to live in New York (195). In this connection it should be noted that at the time she left Vermont petitioner filed with the Town Clerk of South Windham a statement "that I shall retain my well-established residence in the Town of Windham, Vermont" (198-199, 250); and that she paid poll tax in Vermont as late as May 5, 1954 (203).

At no time during the existence of the marriage did the parties maintain any residence or place of abode within the State of New York (125). At no time since the parties were married has respondent had any business, source of income or property within the State of New York except for certain funds held in escrow by his attorneys and certain securities and cash held by a New York bank as collateral for a loan (132).

On July 11, 1952, more than one year before petitioner came to live in New York, respondent obtained a decree of divorce from petitioner in the State of Nevada (133-137). Petitioner was served with process outside Nevada and did not appear in the action (134). Under the decree the parties were "freed and released from the bonds of matrimony and all of the duties and obligations thereof" (137). Respondent remarried shortly thereafter (120).

In 1953 petitioner commenced an action against respondent in the Windham County Court of the State of Vermont. Respondent appeared in the action, in which, after various amendments to the pleadings, the Court was confronted with an application by petitioner for an order for the support and maintenance of herself and of Penelope, the

sole issue of the marriage. By order dated March 20, 1954, the trial court made an allowance of $450 per month for the support of the child and, although finding that the Nevada divorce decree was entitled to full faith and credit, the court awarded alimony to petitioner in the amount of $350 per month (138-143). On appeal, the Supreme Court of the State of Vermont reversed the order of the County Court insofar as it awarded alimony to petitioner and otherwise affirmed. The Court held that the Nevada divorce decree was entitled to full faith and credit and that, being no longer a wife, petitioner was not entitled to alimony under the statutes or common law of Vermont (*Loeb* v. *Loeb*, 118 Vt. 472).

The question which petitioner asks this Court to decide is whether any state in which a former wife catches her husband after a valid *ex parte* divorce is required by the Constitution to entertain a cause of action for alimony. (See Frankfurter, J., dissenting, *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 425).

As her reason for invoking the jurisdiction of this Court, petitioner asserts that the Court below has decided a federal question of substance in a way probably not in accord with the decision in the *Vanderbilt* case (354 U. S. 416). It is her contention that Section 1170-b of the New York Civil Practice Act, as interpreted by the New York Court of Appeals, is unconstitutional under Article IV, Section 2, of the Constitution of the United States and Section 1 of the Fourteenth Amendment.

In her amended complaint petitioner alleged that she was entitled to relief by reason of the Equal Protection clause of the Fourteenth Amendment (71). Apart from this, no constitutional argument of any kind was presented to any of the courts below in any form until petitioner applied to the Court of Appeals for reargument.

POINT I.

Section 1170-b of the New York Civil Practice Act as interpreted by the Court below does not discriminate unconstitutionally against petitioner.

Much of petitioner's argument is devoted to a criticism of the manner in which the Court of Appeals has interpreted the governing statute. Since that Court's views regarding the legislative intent are not reviewable here, we shall confine ourselves to a brief statement of our reasons for submitting that no substantial question has been presented concerning the constitutionality of the statute as interpreted and applied below.

a. The Privileges and Immunities Clause of Article IV, Section 2, of the Constitution was mentioned for the first time in petitioner's application for reargument in the Court of Appeals. This was too late to justify review by this Court. *Herndon* v. *Georgia*, 295 U. S. 441, 443. But in any event this provision of the Constitution lends no support to petitioner's argument. The clause does no more than prevent a state from discriminating against citizens of other states in favor of its own. See *Hague* v. *C. I. O.*, 307 U. S. 496, 511. The case at bar involves no such discrimination against citizens of other states for the obvious reason that petitioner is not a citizen of another state but, on the contrary, claims vigorously to have been domiciled in New York since a time prior to the commencement of the action. Indeed, the Court's decision as to the scope of Section 1170-b is in no sense predicated upon the state citizenship of the former wife; taking the view most favorable to petitioner, the decision results in a differentiation between those wives who are residents of New York at

the time of the divorce and those who are not. State citizenship is a wholly irrevelant factor. If this amounts to discrimination against non-residents, no constitutional difficulty is presented, for a "distinction of privileges according to residence may be based upon rational considerations . . ." See *Douglas* v. *New York, New Haven & Hartford Railroad Company*, 279 U. S. 377, 387 (1929). It was there held not unconstitutional for a state to deny access to its courts to non-residents, since residence and citizenship are not equivalents, and "there are manifest reasons for preferring residents in access to often overcrowded courts . . ." Plainly there are "manifest reasons" for preferring "New York wives" in granting the unusual relief contemplated by Section 1170-b.

b. As for the Privileges and Immunities Clause of the Fourteenth Amendment, the argument is no stronger, even assuming that the point was made below and is properly before this Court. While the precise content of the fundamental rights of United States citizens protected by the clause may not be settled, it is fantastic to suggest that the clause confers upon every American ex-wife an unqualified right to obtain a support decree in any state of the Union without regard to her relationship to the forum which she selects.

c. To the extent that petitioner's contention is based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, her position is equally flimsy. The Fourteenth Amendment requires only that there be some rational basis for any classification created by state statute. This Court has said: "Indeed, it has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it' " (*New York Rapid*

Transit Corp. v. *City of New York*, 303 U. S. 573, 578). Surely the interest of New York in the protection of wives and families deserted here provides a rational basis for the classification which the Court below found to be the intention of the Legislature in the enactment of Section 1170-b.

POINT II.

No decision of this Court supports petitioner's argument that New York is obligated to provide for her.

According to petitioner's theory, the so-called "divisible divorce" doctrine imposes a constitutional obligation upon the State of New York to award alimony to petitioner and to all other former wives whose husbands obtain valid *ex parte* divorces and who thereafter settle in New York. We are told that because New York *may* under certain circumstances provide for the payment of alimony to former spouses (see *Estin*, 334 U. S. 541, and *Vanderbilt*, 354 U. S. 416), it follows that the State *must* do so. We do not know whether this leads to the conclusion that every state is required by the Constitution to enact legislation similar to Section 1170-b or whether it means only that if a state awards relief to some ex-wives under some circumstances it must award relief to all ex-wives under all circumstances. In either event, a more startling *non-sequitur* would be difficult to imagine. The *Estin* and *Vanderbilt* cases hold no more than that a decree of divorce which is entitled to interstate recognition as regards status does not necessarily have any effect upon the wife's right of support. Neither these nor any other decisions of this Court known to us stand for the proposition for which petitioner contends. It may well be sound policy to require husbands to

support former wives whom they have divorced, but surely it is for each state to determine its policy in this regard and to decide whether to extend protection to all such wives or only to those in whom it has a special interest.

Conclusion.

The only federal question in this case is whether the New York courts could properly have applied Section 1170-b to the peculiar facts of this case. Respondent presented this question below, and the existence of constitutional difficulties was noted in the opinion of the Court of Appeals (Appendix to Petition for Certiorari, p. A-5). That Court's decision in favor of respondent made these difficulties academic, and we submit that petitioner has patently failed to raise a federal question of substance for consideration by this Court.

The petition for certiorari should be denied.

Respectfully submitted,

ALEXIS C. COUDERT,
488 Madison Avenue,
New York 22, N. Y.,
Attorney for Respondent.

Dated: January 28, 1959.

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Supreme Court of the United States

OCTOBER TERM 1958

No. 642

ELEANORE M. LOEB,

Petitioner,

against

WILLIAM LOEB,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BENJAMIN H. SULLIVAN,
Union Trust Building,
Washington 5, D. C.,
Attorney for Eleanore M. Loeb,
Petitioner.

CLARENCE COIT MELENEY,
ALEXANDER C. DICK,
ROBERT E. ENGEL,
All of 420 Lexington Avenue,
New York 17, N. Y.
Of Counsel.

February 16, 1959.

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Statement

This brief is filed in reply to the Brief For Respondent In Opposition To Petition For Writ Of Certiorari under the provisions of Rule 24, sub-Section 4 of the revised Rules of this Court. The cases and statutes herein cited are all among those indexed in said Brief for Respondent.

Reply to Respondent's Point I

Respondent attacks petitioner's reliance upon the Privileges and Immunities Clause of Article IV, Sec. 2 of the Constitution with the assertion that said Clause "does no more than prevent a state from discriminating against citizens of other states in favor of its own." That conclusion is not completely warranted by the case cited (*Hague* v. *C. I. O.*, 307 U. S. 496, 511) but the point need not be pressed here, because the Fourteenth Amendment

certainly prevents a state from denying constitutional rights to all citizens, its own as well as those of other states.

Respondent then shifts consideration to residence, and cites *Douglas* v. *N. Y., N. H. & Hartford R. R. Co.*, 279 U. S. 377, 387 for the proposition that there may be "a distinction of privileges according to residence" if based upon "rational considerations". Mr. Justice Holmes, writing for the Court, stated in *Douglas* that in some instances "there are manifest reasons for preferring residents in access to often over-crowded Courts, both in convenience and in the fact that broadly speaking, it is they who pay for maintaining the Courts concerned." Respondent endeavors to conclude, obviously indulging a *non-sequitur*, that there are manifest reasons for preferring New York wives in granting what he terms the "unusual relief contemplated by Sec. 1170-b." Preferring them, we inquire, to whom? Not surely to New York residents. If *Douglas* has any application, it favors plaintiff-petitioner. She sued as a New York resident.

To petitioner's reliance on the Equal Protection Clause of the Fourteenth Amendment, respondent asserts (Brief, p. 6) that "the Fourteenth Amendment requires only that there be some rational basis for any classification created by State Statute," and cites this Court's pronouncement (*N. Y. Rapid Transit Corporation* v. *City of New York*, 303 U. S., 573, 578) that "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it." The full proposition was contained in a preceding sentence to the effect that no question could be raised of the right of a state to enact laws "based on a reasonable classification of the objects of the legislation or of the persons whom it affects" (p. 578).

This is established and sound law, but has no application to the case at bar, for we are not here considering

any classification created by statute. The New York Legislature in enacting Sec. 1170-b of the Civil Practice Act, neither limited or sought to limit the relief afforded to any class, but made it open to all women who could maintain an action for separation, divorce or annulment. Had the Legislature limited the relief to "New York wives", we would be faced with the question of the reasonableness of the classification as discussed in *New York Rapid Transit*. Not only did the New York Legislature not attempt any such classification, but it rejected an early draft of Section 1170-b which specifically limited the relief to a wife whose "last joint matrimonial domicile (with her husband) is or was within the State" (see Supplemental Affidavit of Alexander C. Dick in support of motion for reargument to the Court of Appeals, p. 2).

In short, the classification of "New York wives" was judicially created out of whole cloth, with not a word or phrase in the Statute enacted to suggest it or support it. Respondent dodges that fact and cites no authority,—and none exists, we believe,—for saying that a court can create a classification with resultant discrimination where the Legislature indicated no intention of doing so.

Reply to Respondent's Point II

Respondent's second and final Point ascribed to petitioner the theory that "the so-called divisible divorce doctrine imposes a constitutional obligation upon the State of New York to award alimony to petitioner and all former other wives whose husbands obtain valid *ex-parte* divorces and who thereafter settle in New York" (Brief, p. 7).

Petitioner advances no such theory. Petitioner does not claim that the divisible divorce doctrine created by this Court imposes a constitutional obligation upon the State of New York to award alimony to anyone. The Legislature of the State of New York of its own free will

and accord, and on its own initiative, and in the untrammelled exercise of its own wisdom, enacted Sec. 1170-b to secure alimony to wives who had been abandoned and, under the divisible divorce doctrine, effectively divorced by their husbands. Petitioner maintains that it is the duty of the New York Court of Appeals to interpret and apply Sec. 1170-b to carry out, rather than to defeat, the purposes of this Court in establishing the divisible divorce doctrine.

Conclusion

We conclude and urge that, entirely apart from denial of petitioner's constitutional rights, a substantial federal question is presented. It is federal in an unusual but very real sense, since it was by virtue of the decision of this Court establishing the divisible divorce doctrine, and by virtue of that decision alone, that the Nevada divorce secured against petitioner had to be recognized as valid by her and by the state of her residence. (See Harlan, J. dissenting in *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 432-3.) Whenever the rights of a woman made "single and penniless" by that doctrine are involved the question is of sufficient substance to warrant full consideration by this Court.

Respectfully submitted,

BENJAMIN H. SULLIVAN,
Union Trust Building,
Washington 5, D. C.,
Attorney for Eleanore M. Loeb,
Petitioner.

CLARENCE COIT MELENEY,
ALEXANDER C. DICK,
ROBERT E. ENGEL,
All of: 420 Lexington Avenue,
New York 17, N. Y.
Of Counsel.